

**DELBERT G. JONES**  
Claimant

**BOEING MILITARY AIRPLANES**  
Respondent

**AETNA CASUALTY & SURETY COMPANY**  
Insurance Carrier

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## ORDER

## APPEARANCES

# RECORD

The record is herein adopted by the Appeals Board as specifically set forth in the Award of the Special Administrative Law Judge.

### **STIPULATIONS**

As this matter is an appeal from an Order on Review and Modification, no stipulations were taken by the parties in this action.

### **ISSUES**

- (1) Whether use of evidence presented in the original case is appropriate in a review and modification action.
- (2) What is the nature and extent of claimant's injury and disability?

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

In an Award issued by Administrative Law Judge John D. Clark on November 23, 1992, claimant was awarded a nine percent (9%) permanent partial general body disability on a functional basis as a result of an injury occurring on September 12, 1990. In the original Award, claimant was denied work disability having been returned to work with the respondent at a comparable wage. The Administrative Law Judge found claimant had failed to rebut the presumption of no work disability as contained in K.S.A. 44-510e.

This Award was affirmed by Order of the Workers Compensation Director on July 9, 1993. Appeal was subsequently taken to the District Court of Sedgwick County, Kansas, and on November 1, 1993, District Court Judge C. Robert Bell modified the original Award granting claimant a twelve percent (12%) permanent partial general disability on a functional basis with the denial of work disability being affirmed.

Subsequent to the District Court decision, claimant filed an Application for Review and Modification of the Award under K.S.A. 44-528 contending claimant's work disability had changed significantly due to claimant having been laid off from the respondent. Respondent alleges review and modification cannot occur where new evidence is not placed into the record, further contending that evidence in the record at the time of the original hearing cannot be considered on a review and modification motion. While the Appeals Board agrees some change in condition of the worker's functional impairment or disability which renders the former award either excessive or inadequate is necessary, see Brewington v. Western Union, 163 Kan. 534, 183 P.2d 872 (1947), the Appeals Board finds evidence sufficient in the record from the Review and Modification Hearing to indicate that claimant's award is inadequate and that his work disability has increased as a result of the layoff. This new evidence satisfies the statutory requirements under K.S.A. 44-528

in showing a change of condition. Use of evidence already in existence to supplement the record is not precluded by K.S.A. 44-528.

In a review and modification proceeding the burden of proving the change of condition of the claimant is upon the party asserting it. Direct testimony is not required but some evidence is necessary. Davis v. Haren & Laughlin Construction Co., 184 Kan. 820, 339 P.2d 41 (1959). In this instance, the evidence presented by claimant of the layoff, with the economic ramifications associated with same, is sufficient to show review and modification is appropriate in this matter.

In the original hearing, evidence was presented from vocational rehabilitation experts Monty Longacre and Karen Crist Terrill showing claimant's potential loss of wage earning capacity and a loss of access to the open labor market. Mr. Longacre found claimant's loss of access to the open labor market using the Labor Market Access Plus computer program to be sixty-two percent (62%). Based upon claimant's return to work at a comparable wage, Mr. Longacre opined that claimant had suffered no wage loss in this matter. Ms. Terrill found claimant had suffered a labor market access loss of sixteen percent (16%) and confirmed that claimant's return to work at a comparable wage equated to a zero percent (0%) comparable wage loss.

K.S.A. 1992 Supp. 44-510e(a) states in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment."

In determining the extent of a permanent partial disability, both the reduction of claimant's ability to perform work in the open labor market and the ability to earn comparable wages must be considered. The statute is silent as to how this percentage is to be arrived at . . . . Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

While Hughes indicates that both of the two factors must be considered it does not state specifically how this balance is to occur or what emphasis needs to be placed on each factor. There is no evidence in the record which would indicate the calculation method used in Hughes is inappropriate in this matter. As such, the Appeals Board finds a balance of the two factors when considering the opinions of the experts is appropriate. In combining the sixty-two percent (62%) labor market loss of Mr. Longacre and the sixteen percent (16%) labor market loss of Karen Terrill, the Appeals Board finds claimant has suffered a thirty-nine percent (39%) loss of ability to perform work in the open labor market.

Neither expert found claimant to have suffered a loss of wage earning capacity. The Appeals Board therefore finds it to be zero (0). Using the formula set forth in Hughes in combining both the labor market access loss and the loss of ability to earn comparable wages, the Appeals Board finds claimant has experienced an increase in work disability under K.S.A. 44-528 and is entitled to a nineteen and one-half percent (19.5%) permanent partial general body work disability as a result of his injuries suffered at the respondent.

K.S.A. 44-528 limits the effective date of review and modification of awards to the date that the increase or diminishment actually occurred except that in no event shall the effective date of any such modification be more than six (6) months prior to the date the Application for Review and Modification was made under this Section. Claimant's Application for Review and Modification was filed November 1, 1993. Claimant's layoff from Boeing occurred May 25, 1993, which is within six (6) months of the date of Application for Review and Modification. The Appeals Board therein finds the effective date of claimant's work disability shall be May 25, 1993.

The Appeals Board further notes in the November 23, 1992, Award and the Order Nunc Pro Tunc of the same date, Administrative Law Judge John D. Clark awarded a nine percent (9%) permanent partial general body disability granting claimant 403 weeks of compensation at \$37.28 per week. The District Court's Journal Entry of Judgement increased the claimant's permanent partial general disability to twelve percent (12%) but maintained the rate of \$37.28 per week in the Award. No appeal from this decision has been filed and no nunc pro tunc order clarifying this miscalculation is present in the file. As the Appeals Board is without jurisdiction to modify this error, the Award of \$37.28 per week must remain in effect until the effective date of the Review and Modification Order.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order on Review and Modification of Special Administrative Law Judge William F. Morrissey, dated March 7, 1994, shall be and hereby is modified in that the claimant, Delbert G. Jones, is awarded compensation against the respondent, Boeing Military Airplanes, and its insurance carrier, Aetna Casualty & Surety Company, for a 19.5% permanent partial general body work disability stemming from the accident of September 12, 1990.

Claimant is awarded 12 weeks of temporary total disability compensation at the rate of \$278 per week in the sum of \$3,336.00, followed by 128.86 weeks permanent partial general body disability on a functional basis at the rate of \$37.28 per week, totalling \$4,803.90, followed thereafter by 274.14 weeks permanent partial general body work disability at the rate of \$80.78 per week, totalling \$22,145.03, for a total award of \$30,284.93.

As of October 11, 1994, there would be due and owing to claimant 12 weeks of temporary total disability compensation at the rate of \$278 per week in the sum of \$3,336.00, followed by 128.86 weeks permanent partial general body disability on a functional basis at the rate of \$37.28 per week totalling \$4,803.90, followed by 72.14 weeks permanent partial general body work disability at the rate of \$80.78 per week totalling \$5,827.47, for a total of \$13,967.37 due and owing in one lump sum less any amounts previously paid, followed thereafter by 202 weeks permanent partial general body work disability at the rate of \$80.78 per week totalling \$16,317.56 until fully paid or until further Order of the Director.

The fees necessary to defray the expenses of administration of the Workers Compensation Act are assessed to the respondent to be paid as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Barber & Associates Transcript of Hearing	\$135.70

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 1994.

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BOARD MEMBER

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BOARD MEMBER

c: Kenneth M. Stevens, 1919 N. Amidon, Suite 212, Wichita, KS 67203  
Frederick L. Haag, 700 Fourth Financial Center, Wichita, KS 67202  
William F. Morrissey, Special Administrative Law Judge  
George Gomez, Director

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Claimant

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## ORDER

The Administrative Law Judge's Order noted claimant's objection and the Administrative Law Judge has not issued any order on respondent's Review and Modification Motion. The Administrative Law Judge, in maintaining his docket, has the jurisdiction to establish terminal dates for review and modification proceedings specifically

for the gathering of evidence. As such, the Appeals Board finds it lacks jurisdiction under K.S.A. 44-534a or K.S.A. 44-551 to review this matter, specifically the setting of terminal dates in a review and modification proceeding under K.S.A. 44-528. The Order of Administrative Law Judge John D. Clark filed with the Division of Workers Compensation on September 22, 1994, remains in full force and effect.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 1994.

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Frederick L. Haag, 700 Fourth Financial Center, Wichita, KS 67202  
John D. Clark, Administrative Law Judge  
George Gomez, Director